

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JEFFREY McEARCHEN, et al., : 13-CV-3569 (FB)
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Plaintiffs, :
:
v. : June 25, 2014
: Brooklyn, New York
URBAN OUTFITTERS, INC., :
:
Defendants. :
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TRANSCRIPT OF CIVIL CAUSE FOR TELEPHONIC CONFERENCE
BEFORE THE HONORABLE JAMES ORENSTEIN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 (Proceedings began at 9:34 a.m.)

2 [Mr. Lesser mumbling voice and whispering during colloquy]

3 MR. LESSER: Good morning, Your Honor. Seth Lesser
4 for the plaintiff.

5 THE COURT: Good morning.

6 MR. HORWITZ: Good morning, Your Honor. William
7 Horwitz from Drinkle, Bidder & Reath on behalf of [inaudible].

8 THE COURT: All right, folks. So I wanted to discuss
9 the contents of the notice and I thought it would be easier
10 for us to do this sitting around the table and pencils out
11 because there are a number of points in dispute.

12 Just to give you my overall view of this, I want
13 this to be short and clear to let the potential opt ins make
14 an informed choice without needlessly -- without overloading
15 them with information that really gets to the merits. I want
16 them to have an understanding of what the claim is that they
17 would be joining in if they want to join in that they're bound
18 in. So that's my overall goal. That said, I'll hear you on
19 each of these points but I want you to know how I'm viewing it
20 going in.

21 So the first issue that is whether we have this
22 introductory section with bullet points and, Mr. Horwitz, I
23 know your side says that it's redundant and Mr. Lesser, I know
24 you -- well, actually I don't know what you say about that
25 objection. I don't think you addressed that.

1 MR. LESSER: The redundancy?

2 THE COURT: Yes. Well, basically you don't need it.
3 Everything that you had said in the bullet points is already
4 there so what -- why should we large this out?

5 MR. LESSER: Right. The reason I moved to including
6 bullet points, and it's the same reason sent settlement
7 notices, we now summaries before we get to the longer notice
8 is that consistent with your goal of trying to make it simple,
9 direct and clear we had found putting the -- if I may, my
10 colleague.

11 THE COURT: Who are you, ma'am?

12 MS. SUNSHINE: Naomi Sunshine, Outten & Golden for
13 plaintiffs.

14 THE COURT: Good morning.

15 MS. SUNSHINE: My apologies for my delay.

16 THE COURT: No problem. All right. So we were
17 talking about the bullet points.

18 MR. LESSER: Right. Simply to put up front first the
19 highlights, the bulleted highlights. Now, there is
20 [inaudible] concession, maybe make it a little easier, I don't
21 believe we necessarily, plaintiffs necessarily agree that we
22 need the full what I call Paragraph 44 of the amended
23 complaint, the first bulletin.

24 THE COURT: I just think if this were a typical class
25 action notice, it goes on for pages and pages of tiny type I'd

1 be more sympathetic but it's a few pages. It's not that long.
2 I'd like to do it that way.

3 MR. LESSER: So that would be to delete on Page 1
4 the five or six bullets and go straight to why did I get this
5 notice?

6 THE COURT: Yes.

7 MR. LESSER: Okay.

8 THE COURT: I don't mean to take out you may have
9 rights under a collective action lawsuit, that heading there.
10 I guess that's the subheading to the title. So you may have
11 rights under a collective action lawsuit then go straight to
12 point one.

13 MR. LESSER: Certainly.

14 THE COURT: Now, on the second one, the description
15 of the claim, the defendant's proposal tracks language of the
16 FLSA and Mr. Lesser, you specifically address that but you
17 just say basically unless it's inaccurate or misleading I
18 shouldn't alter your proposed notice. That's not my
19 understanding. I think my job is to make sure that we've got
20 something that accurately and efficiently conveys the
21 information so I think I have the discretion even if it's not
22 misleading in any way.

23 So that said I'm happy to hear you guys about what
24 we should say in describing the lawsuit to the extent you're
25 in disagreement about it.

1 MR. LESSER: On this point, and this is something we
2 particularly feel strongly about, there is case law as we
3 cited to, Your Honor, which says a long magilla as it were of
4 points from the defendant explaining its position in the case
5 isn't that not proper. The reason that --

6 THE COURT: I'm not talking about that. I'm just
7 saying that --

8 MR. LESSER: I'm sorry.

9 THE COURT: Where I disagree with you --

10 MR. LESSER: Am I misunderstanding you?

11 THE COURT: Where I disagree with you is that I think
12 you're saying basically I'm constrained to follow your
13 proposal unless it's misleading and I think I have the
14 discretion to have another non misleading way of doing it. Do
15 you disagree about that?

16 MR. LESSER: I believe absolutely. I believe that's
17 within your discretion. There certainly have been judges who
18 view this as fundamentally -- the plaintiff's document, we
19 cited that.

20 THE COURT: I don't disagree that --

21 MR. LESSER: Right.

22 THE COURT: -- the basic idea is to convey what the
23 plaintiff's claim is.

24 MR. LESSER: Correct.

25 THE COURT: And not to litigate in an adversarial way

1 the argument.

2 MR. LESSER: Correct. So and the reason -- in fact
3 Your Honor has done so many of these cases in recent years and
4 the reason we have moved, plaintiff's moved from what we have
5 in the plaintiff's description of the allegations tracks in
6 the complaint is typically most notices -- in fact, you look
7 at some in the cases that were cited to you they just
8 basically say words along to the effect that plaintiff's claim
9 that they were entitled to overtime because they were
10 misclassified and were not paid overtime.

11 We have discovered in practice that doesn't provide
12 enough information to allow people to think that yes, I may
13 have a claim. The problem the plaintiffs have with this --
14 I've never seen anything like this actually, this kind of
15 description in any notice in a FLSA case where the defendants
16 propose rather than saying [inaudible] obligations or believe
17 that their primary duty and in actuality and in fact was non
18 management is this is misleading because -- this is where I
19 pointed out -- we pointed out in the letter is that these
20 various points don't prove anything by themselves legally
21 because the regulations and the standards are much more
22 complex.

23 This is I believe intended, I believe it's fair to
24 say, to tell somebody if you were a sales associate, you
25 directed the work [inaudible] point something out of it

1 randomly and other employees [inaudible] have been
2 misclassified. That's not even close to correct because --

3 THE COURT: You're talking about the defendant's
4 description.

5 MR. LESSER: Correct. I'm turning to the defense's
6 description.

7 THE COURT: I'm sticking with the plaintiff's
8 description for now.

9 MR. LESSER: Oh. So the plaintiff's description we
10 use and we have been using now for the past year or two we
11 find it -- the worst thing that happens or the most confusing
12 that happens in a collective action, particularly a
13 misclassification collective action of which I've done many of
14 these, is somebody shows up and says I didn't really fully
15 understand what your claim was in the case.

16 Now, I thought it was because of -- we had this -- I
17 thought it was because I wasn't given as much lunch time or I
18 was being misclocked at lunch time. So what we have gone to
19 in the most -- in the last year -- when I say we, my firm and
20 a few others that I'm aware of has basically gone to the
21 complaint and said here are the allegations. That's in --
22 this is basically Paragraph 44 of the complaint in this case.
23 It summarizes and says here's what the claim is about.
24 Remember, as Your Honor may be well aware having been on the
25 bench and seeing all these cases, only a very small percentage

1 of people will opt in to this action.

2 In a retail chain store misclassification case my
3 firm's experience, my experience has been we get approximately
4 15 percent opt ins and if in fact those 15 percent of people
5 don't do managerial work because they're spending most of
6 their time putting the stuff on the shelves, cleaning the
7 floor, you know, handling the deliveries they have a claim.
8 But if we don't provide people with information we do get
9 these individuals in the case who don't understand what it is
10 and they're fully informed and I don't believe there's
11 anything misleading about this. This is literally our
12 allegation.

13 THE COURT: All right. I'm trying to find a way to
14 simplify it. Mr. Horwitz, what do you say?

15 MR. HORWITZ: Your Honor, we agree that the notice
16 should be short, simple, straightforward. The purpose of it
17 is to inform the punitive class action members of the lawsuit
18 and their opportunity to [inaudible].

19 To the extent that Mr. Lesser is citing numbers in
20 terms of what the participation rate is and he is looking for
21 ways to boost the participation rate the fact is the
22 participation rate -- you know, it is what it is and the cases
23 don't go into these long detailed descriptions of what you do
24 on a daily basis, what your duties were, what your duties
25 weren't, and it goes -- what the plaintiffs are proposing goes

1 well beyond just -- let's just go black and white what the
2 claim is and we'll do it for the plaintiff, we'll do it for
3 the defense.

4 There are obviously a significant number of people
5 who do opt in. So to say that it doesn't make any sense or
6 that people can't understand it that's obviously not the case
7 and just if we're going to go into this advocacy -- and that's
8 really what it is. It's advocacy. It doesn't make sense to
9 make it one sided. The first line or the second line
10 approximately of what the plaintiffs propose says this is not
11 a solicitation from a lawyer which we agree to that language
12 but let's not make it a solicitation from a lawyer. It
13 shouldn't be --

14 THE COURT: Right. Okay. So --

15 MR. LESSER: If I may, Your Honor.

16 THE COURT: No, please.

17 MR. LESSER: I'm sorry.

18 THE COURT: Guys, I'm looking for ways to simplify
19 language that I thought you were essentially in agreement.
20 I'm trying to just simplify it because I'm looking at the
21 plaintiff's proposal for why did I get this notice, what the
22 lawsuit is about and then there's this sort of long paragraph
23 in the lawsuit. Comparing it to Point 2 in the defense
24 version what are the allegations in this lawsuit and it's a
25 long blocked paragraph and they're very similar. I'm just

1 trying to -- something I thought was fairly non controversial
2 which is finding a way to just simplify that a little bit.

3 MR. LESSER: Right. I just want to be clear. If
4 anything I'm not trying to boost participation with this
5 description.

6 THE COURT: Guys, I really want you to stay away from
7 motivations on either side. I'm not worried about it and I
8 want to get through the wordsmith. It's a long and boring
9 task. It's going to be made a little simpler if we don't
10 worry about sort of the bigger picture, things of each side
11 here.

12 MR. HORWITZ: Your Honor, with that said if I could
13 clarify one point because then I can better understand what
14 you're saying. We didn't have a lot of changes to the
15 plaintiff's description. There are very little changes. I
16 was just going with what you had said earlier. If you prefer
17 to just go black and white we'll go black and white.

18 THE COURT: No, I don't want to go just black and
19 white. I want to -- with this description I want as I think
20 you guys understandably did, is to give the people who
21 received this notice a way of saying am I part of the group
22 that would assert this claim. So I think the bulk of this
23 paragraph which has the list of tasks which is in both of your
24 proposals makes sense.

25 I'd like to clean up the beginning part of it so

1 it's just -- they don't need to know who the plaintiffs are or
2 the name of the lawsuit. Just say the plaintiffs contend or
3 claim and skip right to they were not paid overtime.

4 MR. LESSER: Right.

5 THE COURT: Then specifically -- and then the rest of
6 it I think that paragraph is fine. That's just as to the
7 description of the claim. Then I think we have a bigger fight
8 and what I understood would be a bigger fight about the
9 description of the defenses and I'm happy to hear you on that.
10 But I do think that the purpose of the notice is to let the
11 plaintiff, potential plaintiffs know what the claim is. The
12 fact that it's a dispute is clearly something that should be
13 provided but I don't think we need more detail about why the
14 defendants think that they comply with the law.

15 But given that I just want to let you know where I'm
16 starting from but I'm happy to hear you both. So given what I
17 said I suppose I should start with you, Mr. Horwitz.

18 MR. HORWITZ: Thank you, Your Honor. Your Honor, we
19 don't think that the list of duties that people performed or
20 didn't perform every day is should be included on either side
21 but to the extent that we're including it for the plaintiffs
22 we thought it made sense to include it for the defense.
23 That's really our motivation is to make it fair.

24 THE COURT: Right. But I wouldn't want a description
25 from the plaintiff's of here's why we think we're right. I

1 wouldn't want evidence for example, but I think you can't
2 intelligibly understand this. You can't make this notice
3 intelligible without saying here's what the claim is. So the
4 balance to me seems to be here's what the claim is and
5 defense, we say it's not true. We say this is true, we say
6 it's not true. But beyond that I'm not sure I see the need
7 for it.

8 MR. HORWITZ: Our only other point on that is we
9 agree that department managers performed these duties. Any
10 department manager is going to look at this is going to say
11 oh, yeah, well this describes me. But if they don't have the
12 other side of it they're going to think oh, I've got a claim
13 but they're not going to understand that the issue isn't well,
14 didn't you on occasion fold clothes.

15 THE COURT: How about -- that's a fair point. How
16 about in the plaintiff's notice where it says Urban Outfitters
17 denies that it has violated the law and claims the department
18 managers are properly classified as exempt and it goes on.
19 How about and claims the department managers who performed the
20 tasks described above are properly classified as exempt.

21 MR. HORWITZ: Right. Although the important words
22 in what plaintiffs proposed in the prior paragraph is that
23 their specific primary duties did not differ substantially
24 from those performed by non exempt employees and they spend
25 most of their time doing hourly tasks such as which is why the

1 idea is not to have anybody look at it and say that covers me.
2 To say are you in that group where your primary duties --

3 THE COURT: Right. But Urban Outfitters -- in a
4 misclassification case like this I think it's fair to say that
5 the position in the lawsuit is not that they don't do these
6 tasks so much as doing these tasks doesn't qualify them for
7 coverage and I think it's fair to put the opt ins on notice of
8 that. So in claims that department managers are properly
9 classified as exempt even though they spend most of their time
10 doing the tasks described above. How about that?

11 MR. HORWITZ: That's certainly better, Your Honor,
12 and perhaps we could add in -- and this is from the proposed
13 language -- Urban Outfitters' position just a little bit of
14 it. For instance, it is Urban Outfitters' position that
15 although the individual experiences of department managers
16 vary in many respects all department managers spend a majority
17 of their time overseeing their departments and working closely
18 with the managers, with the store managers who manage the
19 store.

20 THE COURT: No, I'm not going to do that. I would
21 insert into the claims proposed language after exempt even
22 though they spend most of their time performing the tasks
23 described above.

24 MR. LESSER: I'm sorry.

25 THE COURT: After the word exempt even though they

1 spend most of their time performing the tasks described above.

2 MR. HORWITZ: Well, we wouldn't say most of their
3 time. If they spend most of their time doing those tasks then
4 they would be arguably non exempt. In other words, we're
5 saying they spend some time folding clothes but the majority
6 of their time was spent doing managerial work.

7 MR. LESSER: How about this? How about this, Bill?

8 THE COURT: Even though -- okay. Then I think I can
9 make it simpler. Even though they spend time performing the
10 tasks described above leaving it for you guys to litigate how
11 much and what the effect is. All right? So after exempt even
12 though they spent time performing the tasks described above.

13 MR. LESSER: Did you say some of their time?

14 THE COURT: I don't want to get into the
15 quantification because that's where the dispute lies.

16 MR. LESSER: Fair enough.

17 THE COURT: Okay. Next issue that I think is in
18 dispute. If I miss something let me know. I'm more than
19 likely to do that and I want you guys to catch me if I do.

20 The next issue I have is including defense counsel's
21 contact information. Mr. Horwitz, let me ask you. An opt in
22 plaintiff calls you up and says I got this notice, what's the
23 conversation you want to have and think you can permissibly
24 have?

25 MR. HORWITZ: Well, this is of course somebody who

1 has not opted in.

2 THE COURT: Yes. Look, if it's somebody who's opted
3 in clearly you're covered by Rule 4.2 and you can't talk to
4 them at all. Right?

5 MR. HORWITZ: Right. Correct.

6 THE COURT: So it's somebody and you don't know when
7 the person calls up necessarily if that's [inaudible]. Let's
8 say you can be confident that the person on the other end of
9 the phone is a potential opt in who has not yet made the
10 decision, has received this notice, what conversation can you
11 properly have with that person?

12 MR. HORWITZ: But what do they ask?

13 THE COURT: I don't -- I don't know. That's what I
14 want to know. What's the conversation you contemplate that
15 would make it useful to put your information in here?

16 MR. HORWITZ: Well, I imagine it would very similar
17 to the conversation that plaintiff's attorney would have. I
18 mean, first of all, we would say have you submitted the
19 contempt form. If they have, we stop talking to them. Argue
20 otherwise have a lawyer. Then if they ask what's the claim
21 about we would explain exactly what the claim is which I
22 assume is exactly what Mr. Lesser would do in the
23 circumstance.

24 THE COURT: The plaintiffs described --

25 MR. HORWITZ: And if he would say well, is this going

1 to affect my job. We would say absolutely not. The company
2 has a strict policy against retaliation.

3 THE COURT: Right. Now right there aren't you giving
4 some legal advice?

5 MR. HORWITZ: That's not legal advice and it's
6 exactly -- no, that's not legal advice. That's the company's
7 policy.

8 THE COURT: Okay. So you're advising them of company
9 policy. This will not affect my job. Later this plaintiff
10 says -- gets fired for stealing and has a retaliation claim.
11 You're a witness, right? I had a conversation with Mr.
12 Horwitz and he said I wouldn't be fired and now I'm fired. He
13 promised me I would keep my job if I filed this lawsuit. I
14 have a retaliation claim against him and I want to depose Mr.
15 Horwitz. I will tell you right now at that point I order you
16 deposed and you're out of the case and your firm is out of the
17 case.

18 MR. HORWITZ: Well, obviously we don't want that.

19 THE COURT: Right. And look, I don't want to belabor
20 it but it's really hard for me to see any useful communication
21 that comes out of this that isn't either putting you in a
22 position of a potential witness or putting you in the position
23 of rendering legal advice [inaudible] doing. I don't see the
24 upside that outweighs it if -- and that's why I wanted to hear
25 from you if there's something I'm missing about the potential

1 upside.

2 MR. HORWITZ: Well, I think it would be up to the --
3 that's just it. I think it would be up to the individual.
4 Maybe the individual doesn't want to call up the plaintiff's
5 attorney and find out what the plaintiff's position is. Maybe
6 they want to see -- well, I don't understand. Maybe they want
7 to know what the company's position is. I don't see how us
8 telling them what the company's -- what the company's position
9 is in this case. I don't see how us telling them what the
10 company's position is is giving them legal advice.

11 THE COURT: I'll tell you what. Can we have an
12 agreement that if somebody calls you up as a potential opt in
13 and says what's the company's position you'll send them a copy
14 of the answer?

15 MR. LESSER: Absolutely. And the complaint so they
16 can compare the two. Otherwise they won't understand it.

17 THE COURT: Or the paragraph that the defendants
18 drafted about what is Outfitters position in this lawsuit.

19 MR. LESSER: Sure. That actually says something.

20 THE COURT: I don't want to deprive you of something
21 that fairly happened but I want to do it -- I want to
22 accommodate it in a way that doesn't have what I think are
23 very significant pitfalls and things I would think you'd want
24 to avoid which is a claim that you violated your ethical
25 obligations. I don't -- let me stress this. I don't for a

1 moment think you would do something like that. I'm not
2 worried about that. But the claim would arise from somebody
3 from a lay person who gets the wrong impression of a
4 conversation that he does something that can be characterized
5 as unethical because he's giving legal advice or that makes
6 you a fact witness. I don't want to have to deal with it. So
7 I'm going to keep defendant's contact information out.

8 That makes me go to the issue about which attorneys
9 to contact for questions, same issue.

10 Next one I have is the section that says opt ins can
11 retain their own attorneys and language about payment. I want
12 them to know that in a very simple way they have an option.
13 They can be represented by the named plaintiff's counsel.
14 They can retain their own counsel or they can represent
15 themselves for all opt ins and I think that should include
16 that if they retain their own counsel that counsel's
17 compensation is a matter for them to work out with the
18 verdict.

19 MR. LESSER: Sure. How about -- can I offer a
20 suggestion?

21 THE COURT: Sure.

22 MR. LESSER: We could add a sentence that effect to
23 what's now sub 2, what are my choices or go in sub 3 I
24 suppose.

25 [Pause in proceedings.]

1 THE COURT: I think what are my choices is the better
2 place because it's really that's one of the choices. If you
3 wish to [inaudible] the lawsuit you must sign and complete the
4 enclosed consent form. If you -- and if you -- you must also
5 choose whether to represent yourself or -- you must also
6 choose whether to be represented by the plaintiff's counsel --
7 I'm not worried about the specific words here. But you must
8 also choose whether to be represented by plaintiff's counsel,
9 find your own lawyer and/or represent yourself, find your own
10 lawyer you have to work out the compensation with that lawyer.

11 MR. LESSER: How about this? I'll work out with Bill
12 and I assume we will not have a problem after the sentence
13 says join this action does not mean that you're entitled to
14 any unpaid wages [inaudible] case we'll try to obtain recovery
15 for you. We could add just a simple sentence that says that
16 you can also retain at your own expense your own attorney to
17 represent you in this action.

18 THE COURT: Yes. My concern about at your own
19 expense is that they may find a lawyer --

20 MR. LESSER: On a contingency.

21 THE COURT: -- on a contingency so I don't want to
22 someone on the scale and that's why I'm a little concerned
23 with the language if you join the language -- the lawyers
24 listed below will represent you. So I'd rather put language
25 in the choices section, you can choose to be represented by

1 the plaintiff's counsel. Do you want to put the thing about
2 how you work on contingency there? Fine.

3 Or you can choose to engage your own counsel and
4 work out the compensation with that lawyer or you can
5 represent yourself. I feel I have to put in that last part
6 although I think we're all better off if everybody is
7 represented.

8 MR. LESSER: I've never had a philosophical problem
9 with this kind of sentence. I can absolutely represent to you
10 I've done 30, 40 of these cases. Only once has anybody ever
11 shown up with their own lawyer. The lawyer took one look at
12 it, called me and said you go represent.

13 THE COURT: Yes, I can't imagine but I --

14 MR. LESSER: I've never understood even why
15 defendants wanted [inaudible] frankly.

16 THE COURT: So, Mr. Horwitz, I'm happy to hear you
17 but do you guys think you can work out the specific language
18 of implementing that?

19 MR. HORWITZ: Sure.

20 THE COURT: Okay. All right. Next. How do I stay
21 out of this lawsuit section of the -- defendants want -- did
22 you want that separate from what if I don't join?

23 MR. HORWITZ: Your Honor, I think it should be I
24 think a standalone heading. For somebody who is not going to
25 sit there and spend [inaudible] skim down and say oh, here,

1 here's an opportunity for me to stay out, what do I do.

2 THE COURT: Okay. See, I think it's covered by what
3 are my choices. It's the same thing as choosing a lawyer,
4 right? So I would -- in the plaintiff's version if you do not
5 wish to join this lawsuit you should take no -- you should
6 simply take no action frankly. I would make it even simpler.
7 If you don't wish to join this lawsuit you don't have to do
8 anything at all and you won't be bound by the results of the
9 case.

10 MR. HORWITZ: Your Honor, if possible, I would just
11 -- if there's any way to give it its own heading or something.

12 THE COURT: There is a way we can do it but I'm
13 trying to make this simple and this is the -- the area where
14 we're addressing what are my choices. So why did I get this,
15 what's it about. Two, what are my choices. Well, the choices
16 are join or don't join. If you join lawyers -- these lawyers,
17 those lawyers or somebody else.

18 MR. HORWITZ: Perhaps under what are my choices we
19 could have a little bullet points or a little bold or
20 something so it's -- just so it catches the eye as to the --

21 THE COURT: Okay. If you wish to join the lawsuit,
22 if you don't wish to join the lawsuit those are the two bullet
23 points.

24 MR. LESSER: If it's highlighted maybe then we should
25 do what two of the three cases that Bill had cited to Your

1 Honor did. The cases from Judge Pollak and I think it's a
2 case from Judge Crotty that says if you don't join the lawsuit
3 basically you're statute of limitations could [inaudible] run
4 and the like. In both two of three cases that are cited
5 that's the additional language where this was highlighted. I
6 [inaudible] to try to keep it simple and to avoid going there.
7 For example --

8 THE COURT: If people want to join they're going to
9 join. I don't want to be advocating one way or the other the
10 statute of limitations. I understand it's giving them
11 information they don't have but I think once we go down that
12 road in fairness there's probably more information we should
13 give them and I would just assume keep it simple.

14 MR. LESSER: Okay. So what we'll try -- we'll work
15 out is sort of a subheading, if you wish to join -- if you do
16 not wish to join you do not need -- I'll try to use your
17 language. You do not [inaudible] anything you will not be
18 bound by the results of the case.

19 THE COURT: Right.

20 MR. LESSER: Got it.

21 THE COURT: I mean look, frankly the defendant's
22 version have language -- take out the language of the defense
23 version, the first sentence, you're under no obligation to
24 join this lawsuit against Urban Outfitters but the second and
25 third sentences seem to capture it fairly clearly. I'm not

1 saying you have to do it that way but it seems like a fairly
2 simply starting point.

3 MR. HORWITZ: Okay.

4 THE COURT: The heading whether it's court authorized
5 or court ordered remind me, I just have so many of these
6 cases, Mr. Horwitz, that I lose track. You guys are not
7 consenting to the order going out; correct -- to the notice
8 going out?

9 MR. HORWITZ: Correct.

10 THE COURT: So the only way it goes out is if I order
11 it?

12 MR. HORWITZ: Well, Your Honor, I mean we're here --

13 THE COURT: Look, I don't want to mislead people.

14 MR. HORWITZ: This is -- I think this is probably
15 this argument why people don't like lawyers but I understand
16 this is not going to make a difference in this case
17 significantly.

18 THE COURT: Yes, it won't.

19 MR. HORWITZ: But the fact is I mean if -- we
20 wouldn't be at this point if the plaintiffs weren't asking to
21 send out a notice in the first place. So they have to get
22 authorization from the court. They couldn't just send it out.

23 THE COURT: They do have to get -- right. If all
24 that -- what happened was plaintiff said we'd like to send
25 this out and you said okay they'd still need authorization.

1 So we'd say court authorized notice. Plaintiffs want to do
2 it. You say it shouldn't happen. I'm ordering it to happen.
3 So what this is, is a court ordered but if for whatever
4 comfort it gives you I completely agree, it won't have the
5 slightest bit of difference on what happened to the lawsuit.

6 On the statement of [inaudible], I generally prefer
7 keeping it as simple as possible. Rather than competing
8 versions of how to say it in a separate section I would just
9 do away with both versions and keep what's in the closing text
10 which is fairly standard. I've authorized the notices and its
11 content and the court is taking no position in this case.

12 MR. HORWITZ: I'm sorry. Where are you reading from?

13 THE COURT: You know what, that's not from either
14 version. That's -- I just realized now. I'm going through my
15 notes and I didn't clearly label. This is just what's
16 standard -- the standard language at the bottom in cases, case
17 after case in this district. I can provide you the text but
18 I'll read it out to you now.

19 "This notice and its contents have been authorized
20 by the United States District Court, Eastern District of New
21 York." It has my name. It's usual to have my name. I don't
22 care if it has my name in it. I just assume not have it
23 because it makes it simpler here. So "This notice and its
24 contents have been authorized by the United States District
25 Court, Eastern District of New York. The court has taken no

1 position in this case regarding the merits of the plaintiff's
2 claims or of the defendant's defenses."

3 MR. HORWITZ: Your Honor, I think that's -- it's
4 typically bold.

5 THE COURT: Yes, bold and capsuled.

6 MR. LESSER: So I'm sorry. Just one more time, the
7 last sentence, the court.

8 THE COURT: Yes, I'll give you --

9 MR. LESSER: Okay, fine.

10 THE COURT: I'll give it to you but the court has
11 taken no position in this case regarding the merits of the
12 plaintiff's claims or of the defendant's defenses.

13 I think I've covered the things that you had in
14 dispute. I have a couple of other things that I want to
15 address that I noticed but is there anything else that you
16 guys had that was in dispute?

17 MR. LESSER: We had a section, plaintiff's had a
18 section in our letter addressing e-signatures and websites.

19 THE COURT: Yes. I didn't -- that was my next issue
20 but I wasn't sure it was in dispute.

21 MR. LESSER: I'm not sure if it's in dispute or not.

22 MR. HORWITZ: I think the only detail may be the
23 website and it may not even be in dispute. So essentially
24 we're okay with them being able to submit consent forms in the
25 ways that plaintiffs propose. To the extent that there's

1 going to be a website set up and whatever information -- we
2 need to have some idea of what the website is going to say.
3 To the extent that we have a notice here that's court
4 approved --

5 THE COURT: I think we're on the same page about
6 using a website and technological events as to more officially
7 to gather the information. I leave it to you guys to work out
8 how to do it and how to make sure that you're getting
9 authenticate information from the actual opt in plaintiff. I
10 didn't see that there was a dispute there but that's why I
11 wanted to check.

12 MR. LESSER: Yes, sure. You're both absolutely
13 right. I've forgotten. We'll send you what we used for
14 example in the PetSmart case.

15 THE COURT: Okay.

16 MR. HORWITZ: And then another sort of related thing
17 which I think we can probably work out. We had agreed that
18 there was going to be a reminder notice sent out. We never
19 agreed on the content of the reminder notice but I'm assuming
20 we can work that out.

21 THE COURT: Okay. Now, the -- one issue is -- I
22 wasn't sure about -- I think you actually -- is where we
23 should talk about the possibility of participating in
24 discovery. I think you have it in different places.

25 MR. HORWITZ: I think we agreed on that. Just the

1 location was the issue.

2 THE COURT: Yes, exactly. And I'm trying to remember
3 I know it's standard about this. I don't recall who had which
4 idea but my preference is to put it in the what happens if I
5 join because again I think sort of logically that's where it
6 goes. After you made your choice now that you decided to join
7 here's one of the things that could happen.

8 MR. HORWITZ: That's in our version there, sub 3.

9 THE COURT: This is an issue and I see this a lot in
10 smaller cases that are more local in nature but I think it's
11 worthwhile putting this in and I'm -- the suggestion but I'm
12 happy to hear from you if you have a different view. But
13 something and my preference is as simple as possible along the
14 lines if you have the right to join the lawsuit regardless of
15 the immigration status. Again, I don't think it's
16 particularly germane to this case but --

17 MR. LESSER: Okay. I'm sure it comes up. A
18 restaurant case --

19 THE COURT: Yes, locally I see a lot of cases,
20 restaurant cases where there are discovery requests for
21 documents that reveal immigration status and that's typically
22 been off limits. Mr. Horwitz, any objection to that?

23 MR. HORWITZ: I don't know. I mean my objection
24 would be it's just adding more -- making it longer and so
25 forth but it's not a strong objection. That's fine.

1 THE COURT: I leave it to you to decide where to put
2 that in. I think perhaps either how do I join or will my
3 participation affect my employment. Either one of those is
4 fine. I leave it to you guys but -- and just a very simple
5 statement, federal law permits you to join in the lawsuit and
6 share in any recovery regardless of your immigration status is
7 one that I've approved before. However you want to wordsmith
8 it is fine with me. If you have a dispute you let me know.

9 I've seen versions of it that explicitly say you
10 won't be asked to disclose your immigration status. I don't
11 think it's necessary in a case like this where it doesn't seem
12 to come up but, again, you guys work it out. Let me know if
13 there's a problem.

14 On the consent form --

15 MR. LESSER: I think the only issue there was whether
16 a sentence -- I think Urban wishes to have a sentence that I
17 forego my right to have my own attorney or some such which
18 I've never seen in a consent form. That seems overkill.

19 THE COURT: Yes, maybe you can do it as a check box.
20 Maybe you can have a check box. Named counsel, I'll find my
21 own attorney or someone else. However you want to do it.

22 MR. LESSER: I've seen it that way. Normally it
23 seems [inaudible].

24 THE COURT: I don't feel strongly about it. As long
25 as it tracks what's -- the information in the notice.

1 MR. LESSER: Okay.

2 THE COURT: Right. So the choices on the form are
3 the same as the choices outlined in the notice.

4 MR. HORWITZ: How about let's just -- try to make it
5 simpler, a check box can look more complicated, something else
6 to check. I hereby -- the present last sentence and --
7 plaintiff's copy. I hereby designate plaintiff's counsel
8 representing [inaudible] decision by [inaudible] litigation
9 settlement or I wish to be represented by my own counsel
10 identified below.

11 THE COURT: My only concern, I don't feel strongly
12 about this, is if you have it in a blocked paragraph like that
13 and there's an either/or it could be confusing. If you had a
14 check box at least there are going to be some that don't have
15 it --

16 MR. LESSER: The problem then becomes [inaudible]
17 check box. They don't check any of the boxes.

18 THE COURT: Right.

19 MR. LESSER: We get it back. We assume and everybody
20 generally assumes they mean us, plaintiff's counsel
21 identified, but it hasn't been checked. So somebody -- it
22 could be completely -- you got to call them back, you got to
23 get on the phone and --

24 MR. HORWITZ: Your Honor, the way that I understood
25 you saying it was there will be a check box that says I'll

1 find my own attorney. So if they don't check it then they're
2 not going to find their own attorney.

3 THE COURT: What I was thinking and frankly
4 [inaudible] is to have three check boxes. You have to choose
5 one but if none are chosen then you have to write back. On
6 second thought I think you're better off with the paragraph as
7 you described it but I think it should also have "or I will
8 find my own attorney or represent myself."

9 MR. LESSER: Okay.

10 THE COURT: As noted below. Because that way if all
11 you get is a signature you're the counsel.

12 MR. LESSER: Right.

13 MR. HORWITZ: Your Honor, on that form we would
14 really prefer the language that we suggested where it says I
15 hereby authorized the following prosecution of the claims in
16 my name and on behalf of this collective action and against
17 defendant Urban Outfitters to contest. As the plaintiffs
18 [inaudible] to [inaudible] overtime wages. I mean our
19 position is it should be to contest what I believe to be the
20 failure --

21 MR. LESSER: There's no issue that they weren't paid
22 overtime.

23 THE COURT: Well, no, but as required under federal
24 law. But the point is it's an allegation by the person
25 signing it and so of course it's what he believes. I don't

1 think -- look, if it's to preserve a position I don't tink you
2 need to do anything. If it's to better inform I think the
3 information comes in the notice.

4 MR. HORWITZ: Well, I think that -- then my concern
5 would be they look at the notice, they look at this and they
6 see oh, it's accepting the fact that I -- that the defendant
7 failed to pay me as required by federal law.

8 MR. LESSER: Let me take out the phrase as required
9 by federal law. I don't think we need it and that addresses
10 your concern.

11 THE COURT: How about taking out everything after
12 Urban Outfitters, Inc. until -- that whole clause. So strike
13 out everything from to consent until federal law.

14 MR. LESSER: Perfect.

15 MR. HORWITZ: Thank you, Your Honor.

16 THE COURT: It makes it shorter. Okay.

17 Anything else about that part of the form?

18 MR. LESSER: No.

19 MR. HORWITZ: Your Honor, we have a suggestion and I
20 suppose it's not necessary but at the top pursuant to Fair
21 Labor Standards Act. We just added that which wasn't in the
22 proposed form but --

23 THE COURT: I don't have a strong view on it.

24 MR. HORWITZ: I don't know if plaintiffs had a view
25 on it.

1 THE COURT: But my approach to it is the less
2 language the better.

3 MR. HORWITZ: That's fair, Your Honor.

4 THE COURT: Okay. Good. All right. I think that
5 covers everything I had on my list. Anything else you guys
6 wanted to raise on the notice or the form?

7 MR. HORWITZ: I think we covered it.

8 THE COURT: Last thing. When I put something on the
9 docket I can either have a very simple as set forth on the
10 record or I can have something very detailed. I'd rather do
11 the former and unless you feel that there's anything not clear
12 enough that you need some guidance from me in the docket.

13 MR. LESSER: I suspect we can order the transcript if
14 we really can't come --

15 THE COURT: Okay.

16 MR. LESSER: And we'll do it expedited but frankly
17 we'd rather make your life easier.

18 THE COURT: I appreciate that.

19 MR. LESSER: I assume I speak for you, Bill.

20 MR. HORWITZ: We'll work it out. I don't expect t at
21 we're going to have to bother Your Honor.

22 THE COURT: Okay. I'll just -- I'll ask my law clerk
23 to send to you the text that I said I would provide about that
24 standard block at the bottom. I'll just email that out to the
25 two of you.

1 Thank you, folks.

2 MR. LESSER: Thank you for your time.

3 THE COURT: This is one of the things you just have
4 to sit down and do it sometimes. I appreciate you taking the
5 time.

6 MR. HORWITZ: This is why I didn't become a
7 corporate lawyer myself.

8 THE COURT: Have a good day.

9 (Proceedings concluded at 10:18 a.m.)

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1 I certify that the foregoing is a court transcript from
2 an electronic sound recording of the proceedings in the above-
3 entitled matter.

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5 _____
6 Shari Riemer

7 Dated: July 3, 2014
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